

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of)	
)	
Appropriate Framework for)	CC Docket No. 02-33
Broadband Access to the Internet)	
Over Wireline Facilities)	

COMMENTS OF FRANCOIS D. MENARD v1.0

1. The following comments are presented by Francois D. Menard, a citizen of Canada. It is believed that several elements of the present effort in Canada to implement competition over higher-speed facilities can be utilized by the FCC to resolve several issues which it is currently considering.

2. On February 15, 2002, the Federal Communications Commission (Commission) released a *Notice of Proposed Rulemaking (NPRM)* in this proceeding. In this *NPRM*, the FCC seeks comment on a tentative conclusion that wireline broadband Internet access services, whether provided over a third party's facilities or self-provisioned facilities, are information services, with a telecommunications component, rather than telecommunication services. The Commission seeks comment on whether to impose certain *Computer III* requirements on Bell Operating Companies (BOCs) that would be removed on a state-by-state basis once it has achieved certain performance measurement levels in providing non-broadband services, and/or once it has received FTA § 271 approval from the Commission. Moreover, the Commission seeks comment on whether to modify or eliminate existing access obligations on providers of self-provisioned wireline broadband Internet access services. Finally, the Commission seeks comment on whether facilities-based providers of broadband Internet access service provided via wireline or other platforms, including cable, wireless, and satellite, should be required to contribute to the universal service fund.

3. In a separate proceeding, under GN Docket No. 00-185, CS Docket No. 02-52, and as per the statement of Commissioner Kathleen Q Abernathy in the Declaratory Ruling & Notice of Proposed Rule Making 02-77, the FCC is also considering at the same time:

"What is the appropriate role for the Commission in ensuring that consumers receive the benefits of competition and choice? If the Commission decides to maintain some form of access obligation at the conclusion of the Wireline Broadband proceeding, we would need to develop a compelling rationale if we were to refrain from imposing an analogous requirement on cable operators."

4. We can see from these comments that the Commission is effectively concerned with making a decision which is coherent across both dominant broadband access technologies of today that is ADSL and Cable Modem.

5. It is being submitted that the reclassification of cable modem services as an information service does not necessarily subtract cable modem services from non-discriminatory interconnection requirements¹. Consequently, it is not necessary, nor appropriate for the FCC to consider removing obligations of interconnection on ADSL services or FTTH services provided by dominant incumbent local exchange carriers.

6. As part of the deliberations to follow the consideration of the public record in this proceeding, the FCC should be reminded that perhaps its more important role is of balancing the public's interest against the objective of the 1996 Act of implementing local competition. As part of this proceeding, the FCC is being asked to consider whether the further deployment of broadband in the United States is a social objective that has more priority than the implementation of competition over broadband facilities in markets which are being served today.

7. Consequently, the Commission is thus faced with having to evaluate whether further extending the monopoly of the dominant telephone carriers and of the broadcasting distribution undertakings in the United States, by removing their interconnection

¹ This issue is being considered in the NPRM launched by FCC Declaratory Ruling 02-77 which states in paragraph 72: "Next, in light of marketplace developments, we consider whether it is necessary or appropriate at this time to require that cable operators provide unaffiliated ISPs with the right to access cable modem service customers directly (what we refer to hereafter as "multiple ISP access").

obligations, would be economically more efficient than use of the existing Universal Service Fund to finance deployments of broadband in those areas where business cases have yet to be made.

8. It is being contended that the record has not produced any significant evidence to the effect that the potential removal of the requirements for interconnection would result in the further deployment of broadband. To date, only unsubstantiated claims to this effect have been produced on and outside of the public record by the lobby of dominant carriers and of their suppliers.

9. It is also being contended that for the Commission to prioritize the further deployment of broadband over the development of a competitive supply of facilities would create a fundamental departure from its current statutory obligations.

10. The Commission should also consider the effect of any proposed rulemaking on the current race to deploy fiber to the home (FTTH). The main issue is that as soon as FTTH is deployed, inter-modal competition with legacy telephone, cable television or any wireless infrastructures will be meaningless. Such infrastructures just cannot cope with the sheer speed of FTTH. The Commission should seriously consider that were it not for today's UNE regulations on copper loops, there would indeed be a reason for deploying a third wireline infrastructure aside from POTS or cable television. It is uncertain that the present record would result in any outcome which would remove the requirement of ILECs to supply UNE loops to CLECs.

11. Would the Commission attempt to validate with any person seriously involved with FTTH projects today, it would find that the lobby of incumbent telephone carriers to remove interconnection obligations is a strategy to pave the way for complete and total eradication of any competition through supply and control of FTTH wireline facilities to the home. For the Commission to interpret the submissions of the ILECs in this proceeding in any other way would show a fundamental misunderstanding of the present maturity and readiness of FTTH products and solutions.

12. In rendering the declaratory ruling to follow in this proceeding, the Commission should show that it has seriously reviewed the efforts currently being made by the CRTC

in Canada to formalize a transition from a pure facilities-based competition regime to one which will soon require the establishment of more Points of Interconnection (POIs) to alleviate its limitations. The Commission should note that the requirement of implementing more POIs is diametrically opposed to the present strategy being considered by the FCC to further broadband deployments by removing interconnection obligations

13. The following background information on the process currently in place in Canada to formalize a transition from pure facilities-based competition to an environment in which several more POIs will be mandated. Three parallel efforts are currently being considered by the CRTC to mandate the establishment of more POIs. A short description of these efforts follow for the benefit of the public record in this proceeding. The first effort of the CRTC which will be described is the Multi-Gateway Point of Interconnection for local exchange telephone service. The second one is about POIs for third party access to ADSL underlying service. The third one will be POIs for third party access to higher-speed access services of cable carriers (DOCSIS Third Party Access).

14. The requirements to establish POIs for local exchange telephony has been formalized by CRTC Public Notice 2001-126² - in response to Bell Canada tariff Notice 6597³. In this tariff notice, the Multi-Gateway POI (MGP) is being described as:

“MGP is an optional service available to CLECs, for the purpose of establishing with the Company, local interconnection arrangements in certain exchanges without the need for the CLEC to establish POIs in those exchanges.”

15. It can be observed from this effort that with the MGP service, it will no longer be necessary for a CLEC to build facilities to every central office in a given local calling area in order to service all end-users in this local calling area. The MGP service will therefore discourage further investment into new facilities and the use of ILEC central offices as shared facilities.

² <http://www.crtc.gc.ca/archive/ENG/Notices/2001/pt2001-126.htm>

³ <http://www.crtc.gc.ca/8740/eng/2001/b2-6597.htm>

16. It is believed that the considerations given by the CRTC to the necessity to implement competition are entirely applicable in the United States. The cost of collocation into every central office and to build outside plant into every central office is too expensive for even a few players to bear in Canada. It is believed that the same reality exists in the United States. After the bursting of the telecom bubble last summer, capital investments have been reduced even more significantly. The CRTC is readjusting its position on the requirements for facilities-based and is entertaining the possibility that ILECs be required to provide a Multi-Gateway POI service, which would make it possible for a CLEC to only have to interconnect at one central office to serve an entire local calling area.

17. In the case of cable modem service, in Decision 96-1⁴, the CRTC has found that when providing non-programming services, cable television operators were actually acting as common carriers and should be regulated as such. This decision was followed by proposals by the cable carriers to provide a point of interconnection at a shared router instead of allowing competitors to collocate cable modem termination systems in cable television head-ends. The record of the regulatory effort to determine the terms and conditions for third party access to points of interconnection closed on March 14th 2002. The CRTC is shortly expected to make a determination on the quantity of POIs that incumbent carriers should operate to satisfy the requirements of both local and remote interconnection to a local cable television system providing cable modem service. The record on this issue has been active since January 1996, more than 6 years ago. It is thus extremely complex and thorough. The Commission should disregard any unsubstantiated claims made in this record that the process in Canada is a failure and that therefore it should not apply in the USA, as any of such claim demonstrates a fundamental misunderstanding of the process undertaken in Canada. To the contrary, the Commission should seek to learn more from various stakeholders in Canada in order to fast track the process and navigate around its shortcomings more quickly.

18. In the case of the ADSL service, the CRTC has yet to find a reason to require ILECs to provide wholesale ADSL services. In Western Canada, the incumbent telephone

⁴ <http://www.crtc.gc.ca/archive/eng/Decisions/1996/DT96-1.htm>

company offers this service through a subsidiary registered as a CLEC and which collocates DSLAMs into its central offices. On the other hand, no services are provided from Remotes. In the case of Quebec and Ontario, Bell Canada has filed a wholesale rate in order to provide a service from remote locations which aren't available for collocation. The inability of CLECs to tap into local loops from remotes forces them to subscribe to a wholesale ADSL service. Following a complaint of the Canadian Association of Internet Providers, Bell Canada filed a new economic evaluation for ADSL demonstrating profitability of ADSL third party access at the rate of C\$21.90 per month⁵. It is logical to assume that this economic evaluation will eventually be used in the United States by state PUCs to consider ADSL rates in the US. Why would ADSL be tariffed at US\$50 per month when a just and reasonable rate for third party access can be as low as is C\$21.90 (US\$14).

19. We can infer from the regulatory public record in Canada that the CRTC is currently challenged with making a determination on a coherent framework to oversee the implementation of several more points of interconnection. Such framework will determine such critical issues as;

- 1) The terms and conditions for interconnection at a POI,
- 2) How facilities-interconnection are to take place at a POI,
- 3) The required number of POIs,
- 4) The ability to force interconnection at the last bottleneck
- 5) And the ability of an incumbent carrier to unilaterally decide which equipment to use at a POI.

20. We can see from the situation created in the last couple of months where the Federal Trade Commission was the one to actually mandate interconnection in absence of any requirements to do so from the FCC that the largest ISP's such as Earthlink were able to negotiate terms of interconnection with the dominant carriers. However, without conducting a comprehensive investigation of the terms of interconnection that were developed, the FCC will be completely unable to appreciate that such terms actually

⁵ Bell Canada Tariff Notice 6622 - <http://www.crtc.gc.ca/8740/eng/2001/b2-6622.htm>

reduce the ability of the interconnecting ISP's to provide a meaningfully different set of services down to zero. That is, in absence of a clear definition of the characterization of services that is permitted by the FCC by an operator of an underlying infrastructure, the terms of interconnection which get developed have for single purpose to limit the possibility to innovate. It is safe to conclude that any request by a new entrant to interconnect for the purpose of innovating faces a brick wall. The FCC should be required to closely monitor the technical implementation of open access for its ability to support IPv6, IP Telephony & IP Television. Furthermore, it is also safe to assume that even those who willfully entered into an agreement with the dominant carriers, have terms and conditions which are practically unworkable and yeild profit margins that are much lower than if third party access could be purchased at just an reasonable rates.

21. We can see from the recent set of comments and reply comments in CC-00137⁶ that several submissions were filed by ILECs and their suppliers in favor of declaring broadband deployments as being non-dominant.

22. Such comments cite multiple public statements of representatives of incumbent telephone and cable carriers stating that were it not for the current regulatory regime to which they are subjected, they would then be capable of financing the further deployment of broadband in their territories.

23. Before the credibility of this public lobby can be evaluated, it is necessary for the FCC to identify the framework that it uses to evaluate whether or not the current regulatory regime does indeed impair the further deployment of broadband. In the absence of actual quantitative arguments in favor of deregulation, let alone proper cost of opportunity economic evaluations, it is even more necessary that the FCC disclose the nature of the framework that has been put in place for evaluating comments received in this NPRM.

24. Such a framework must seek to validate that facilities-based competition is indeed possible, vibrant and sustainable. Unfortunately, facilities-based competition has been tried and tested and has failed to introduce competition. The costs to overcome the

⁶ http://gullfoss2.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch_v2.htm?ws_mode=retrieve_list&id_proceeding=01-337&start=1&end=67&first_time=N

limitations imposed by existing support structures and rights-of-way are so prohibitive for new entrants that incumbent cable and television carriers not only remain dominant, but are gatekeepers to the entry of competition.

25. For the purpose of this argument, we will suggest that incumbent carriers which operate their own infrastructure and associated support structures must continue to be regarded as dominant, as regard broadband deployments, both in terms of market-power and in time-to-execute .

26. For example, experience with facilities-based competition has shown that incumbent carriers often operate support structures that are substandard, need to be replaced, lack spare capacity, are apparently completely full etc. Current practices are such that the cost to overcome such limitations falls entirely on the party requesting access. However, incumbent carriers routinely overbuild, thus violating the same engineering requirements that they impose on competitors. This will become a routine practice in the race to implement FTTH.

27. Furthermore, the process is structured in a way that it generally allows the incumbent carriers to gain new spare capacity at the expense of the new entrant, by overbuilding structures for their own use with funds of new applicants. For example, if an applicant wants to lease conduit space from the incumbent and such conduit space is not available, the incumbent will put in more capacity for itself at the expense of the applicant.

28. Furthermore, the fact that 40 to 50% of any existing support structures do not have sufficient spare capacity to accommodate new entrants wishing to deploy much smaller and lightweight fibre optic cables indicates that many existing cables will soon be taken down. This is especially true for 600-pair+ twisted pair telephone copper cables. Incumbent carriers have the flexibility to pull out copper cables from support structures with no spare capacity, in a time window that grants them the sole right to be the ones to fill-up again all capacity with optical fiber. This can create a support structure lottery environment in the context of FTTH deployments, which will confer an unprecedented advantage to the ILECs in the deployment of FTTH. Because ILECs were able to build support structures in an environment where they were given a monopoly, the

Commission should recognize that the deployment of broadband infrastructures by new entrants is will never be done under a level playing field and under competitive equity. At this very moment in Canada, several public tenders who call for the build out of private dark fibre optic networks are being asked to be suspended under various sections of public tendering legislations until such time as the CRTC develops proper imputation tests procedures for owners of support structures⁷.

29. It is also important to note that another support structure requests permit analysis fees requested by owners of existing support structures are often used as a deterrent for the venue of competition in Canada. Therefore, the FCC should monitor the fees which are being charged in the USA. They often can easily amount to 10% of the cost of construction of a new project. They are often high enough to kill the business case of an over builder.

30. The NTIA is now considering investigating such issues⁸. However, the NTIA is positioning this as a right-of-way problem, whereas this is clearly a support structure issue. In all areas where FTTH aerial overbuilds can take place, it remains the entire responsibility of the FCC to ensure that unfettered access to existing pole lines and messenger wires exist for overbuilders. The FCC has to have mechanisms to validate that support structures cannot be used to by dominant carriers for the sole purpose of protecting their market power.

31. While companies such as Corning and Alcatel do not speak to these clear realities in their final comments, which can be found under CC Docket Number 01-337, the fact is that those companies are suppliers of the ILECs and have clearly taken the position to support their efforts to re-monopolize broadband.

32. For this reason, the Commission should recognize that incumbent carriers have substantial dominance in terms of the ability to shorten the time to execute the deployment of new broadband infrastructures. The Commission should therefore take

⁷ <http://www.crtc.gc.ca/PartVII/eng/2002/8690/v22-01.htm>

⁸ <http://www.ntia.doc.gov/ntiahome/speeches/2002/quello32602.htm>

measures to ensure that if it removes the requirements for interconnection, that there is indeed a level playing field for the installation of new fibre optic cables. Based on the current inability of the FCC to prevent incumbent carriers from using their support structures to fend off competition, it is certain that no new entrant will ever be able to outpace the deployment of FTTH if it races against the ILEC. Therefore it is clear that the first owner of FTTH who is conferred the right to prevent interconnection will be the one to dominate the market.

33. The FCC would stand to win a great deal if it were responsible for approving regulated rates. Unfortunately, in the US, this is the responsibility of 50 different public utility commissions and not of the FCC. As a result, the FCC does not see the economic evaluations demonstrating that ADSL service or cable modem services are profitable and include a 25% mark-up at an average of C\$20.50 per month.

34. The number of Commissioners at the FCC is by any standard, rather limited in comparison to other countries. Virtually all other countries have more Commissioners than the FCC. For example, the CRTC in Canada has 13 Commissioners. Regulatory agencies need to have large number of Commissioners in order to make it more difficult for industry lobby to make it through. It is for the same reason that seldom do Supreme Courts only have 5 judges.

35. The FCC needs to develop a framework for determining whether or not an ILEC is a dominant player in any market. Framing the concept of "market dominance" has been the subject of many previous hearings in Canada but none are being referenced in this proceeding. The Commission should be careful not to embrace a definition for market dominance developed in a time when facilities-based competition was deemed to be possible while the harsh 2002 situation points to the necessity of POI regulation. Only by regulating the Point of Interconnection will there be any chance of making telecommunications, a competitive industry.

36. It is being submitted that the FCC employs the following simple and pragmatic definition of market dominance. The definition has a simple objective of measuring how use of legacy systems has for only purpose to delay innovation on the Internet.

Market dominance should continue to be recognized until such time as the facilities in the control of the ILEC and the Cable Carriers are no longer being used to prevent the migration of legacy telephone and television applications onto the Internet.

37. The FCC should provide an explanation on the public record as to why the public interest is better served by continuing with a failed idea of facilities-based competition. Since market dominance is a concept that is intimately tied to the level of competition in any given market, it is necessary to define how the competitiveness of the telecommunications market should be measured.

38. It is being submitted that the FCC should employ the following definition for what is a competitive telecommunications industry:

The telecommunications industry in a given market shall be deemed to be competitive if any of the two following scenarios is met:

Scenario A)

- 1) Transmission facilities which permit end-users to freely replace transmission equipment at both ends of the network can be easily purchased at cost-based rates plus a reasonable mark-up, and as a result
- 2) Service provider competition is free from any unjustly discriminatory pricing practices, terms and conditions.

Scenario B)

- 1) Transmission facilities are attached to a shared point of interconnection equipment which operates non-blocking switching equipment capable of directing any packets originating from any number of devices on any a customer premise network onto any chosen service provider interconnecting at the POI;
- 2) Such facilities can easily purchased at cost-based rates plus a reasonable mark-up, and;
- 3) Customer premise equipment required by the owner of the transmission facilities is standardized by ITU-T or IEEE, affordable and available from multiple truly competing manufacturers, and as a result

4) Service provider competition is free from any unjustly discriminatory pricing practices, terms and conditions for getting service.

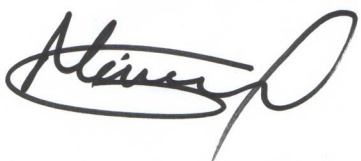
40. These proposed definitions are not technology-specific. They can apply both for wireline, free space optics, microwave and satellite deployments.

41. Until such time as the telecommunications industry is demonstrated to be truly competitive in a given market, dominant carrier should be required to operate points of interconnection at the last bottleneck facility and at any location where powered equipments are used. The rates, terms and conditions for operating such a point of interconnection shall be non-discriminatory and should recover imputable costs plus a reasonable mark-up. The rates do not need to be necessarily affordable in order to meet such requirements; they are only required to be sufficient to recover imputable costs, plus a reasonable mark-up. Where rates are not affordable, use of the universal service fund may then be sought.

42. If there were guaranteed that CLECs would not be capable of ordering unbundled local loops from the ILECs, only then would they have the incentives to invest in new facilities.

43. Unless the FCC maintains Computer III obligations all owners of facilities until such time as a competitive supply of FTTH loops develops, the race to put-in FTTH will undoubtedly lead to the development of proprietary content islands and walled gardens which will paralyze innovation, reduce economic development and destroy the Internet as we know it today.

44. It is respectfully submitted that the Commission should considers facilitating the development of open access standards and discourage any legislations which may seek to prevent municipalities from deploying FTTH community networks.



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P.O. Box 203

Pointe Du Lac, QC, G0X 1Z0
Canada
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